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TAXING REALITY: RETHINKING PARTNERSHIP DISTRIBUTIONS

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Partnerships play an increasingly vital role in the federal income tax. Yet partnership taxation is deeply flawed, with complicated provisions that strain the voluntary compliance mechanism on which all federal income tax relies. This Article considers one of the most difficult challenges facing partnership taxation: the treatment of distributions.

Distributions are ubiquitous transactions that transfer cash or property from a partnership to a partner. Although distributions vary dramatically in their purpose and the kind of property involved, their tax treatment follows a unitary approach. The principle of “nonrecognition” means that distributions do not produce any immediate tax consequences. This nonrecognition premise has caused great abuse and complexity, as partnerships have used distributions as tax shelter vehicles, and the government has responded with narrow anti-abuse “fixes” that are often counterproductive. Calls to reform these anti-abuse provisions have been a constant presence throughout a half-century of tax scholarship.

This Article argues that the existing scholarship largely misconstrues the problem with partnership distributions. The core difficulty is the nonrecognition premise at the system’s foundation, the very problem that particular anti-abuse provisions were designed to combat. Meaningful reform of partnership distributions thus requires a fundamental rethinking of nonrecognition and its role in partnership taxation.

This Article offers an alternative vision of partnership distributions, one without the imprint of nonrecognition. It reimagines partnership distributions from a recognition-based perspective, which would ground the tax treatment of these transactions in economic reality. Of particular importance are liquidating distributions that involve the complete or partial termination of a partner’s investment in the partnership. Consistent with their commercial substance, liquidating distributions should be treated as taxable exchanges in which the partner receives cash or property from the partnership in exchange for relinquishing her interest in the partnership and its underlying property. Under a recognition-based approach, partnership distributions would indeed look very different than they do today, simpler, more equitable, and more stable.

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COPYRIGHT’S VICIOUS TRIANGLE: RETURNING AUTHOR PROTECTIONS TO THEIR RATIONAL ROOTS

by Robert Shepard..... 731

Copyright protections encourage the production of intellectual property by temporarily restricting free public access, a constitutional design that Justice Stephen Breyer has called a “two-edged sword.” Yet, the Copyright Clause really enshrines a triangular relationship among authors, consumers, and commodifiers, a third constituency that has always interposed itself between author-creators and consumer end-users.

Though the Copyright Triangle is nothing new, a fundamental reordering of these constituencies is in progress, with digital commodifiers such as Google assuming a dominant role. Though they sometimes proclaim themselves champions of free public access to culture, these commodifiers have instead aggrandized themselves at the expense of intellectual property creators and, ultimately, consumers, damaging the Copyright Clause’s delicate balance of private incentives.

This Note demonstrates how copyright law increasingly serves the interests of a limited subset of commodifiers at the expense of authors and the public. It shows how two recent Supreme Court decisions that ostensibly benefited authors, *Eldred v. Ashcroft* and *Golan v. Holder*, instead exacerbated this trend. The Note advocates two fundamental changes to copyright laws that may help protect authors’ rights in the expanding digital universe, and also protect the public’s right to gain timely, free access to intellectual property. First, Congress should allow authors to more rapidly reclaim the rights they grant to third parties, such as publishers. Second, Congress should dramatically reduce copyright durations for certain kinds of intellectual property, including books, injecting these works into the public domain more rapidly. These changes may not only bring equilibrium to the three sides of the Copyright Triangle but also restore the grand bargain enshrined in the Copyright Clause.

DO ASK, DO TELL: CALIFORNIA’S SPOUSAL FIDUCIARY DUTY AND FINANCIAL DISCLOSURE OBLIGATIONS

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This Note explores the inconsistencies between the Family Code and the Corporations Code about whether spouses are required to disclose material information. These inconsistencies have created uncertainty regarding what financial information must be disclosed between spouses, and whether it must be disclosed “upon request” or “without demand.” The Note first analyzes the history of both Family Code Section 721 and Corporations Code Sections 16403, 16404, and 16405 to better understand the uncertainty, and offers a solution to remedy the statutory inconsistencies. The Note concludes that in order to eliminate this uncertainty, the California legislature should amend Family Code Section 721 to clarify what conduct constitutes a breach of fiduciary duty, the type of information that must be disclosed between spouses, and whether information must be disclosed “upon request” or “without demand.”

THE DIGITAL MILLENNIUM COPYRIGHT ACT AND THE CLASH BETWEEN AUTHORS AND INNOVATORS: THE NEED FOR A LEGISLATIVE AMENDMENT TO THE SAFE HARBOR PROVISIONS

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The Digital Millennium Copyright Act of 1998 (DMCA) was enacted with the goal of bringing copyright law into the digital age. Through the DMCA, Congress attempted to balance the interests of what were considered to be the traditional copyright holders—musicians, film studios, record companies, and television networks—with those of Internet Service Providers (ISPs) by combining key digital copyright protections with a series of “safe harbor” protections for qualifying ISPs. Over the past decade, conflicting and convoluted judicial interpretations of the safe harbor provisions have resulted in unpredictable legal standards and a deep divide between traditional media and new technology. This Note explores these judicial decisions and proposes a legislative amendment to the DMCA safe harbors. Further, this Note argues that to allow new technologies to evolve and to create an environment of economic prosperity for both old and new media—Congress must amend the vague safe harbor provisions with specific definitions and provide a higher level of protection for ISPs.

THE (UN)INFORMED USE OF CREDIT: THE NEED TO CLARIFY CONSUMERS’ RIGHT OF RESCISSION UNDER THE TRUTH IN LENDING ACT

by Alan Ritchie..... 831

Currently, over 1 million properties in the United States are in some stage of foreclosure. Although foreclosure rates have decreased in recent years, they remain significantly higher than pre-lending-crisis rates, revealing that

foreclosure is relatively commonplace in the current housing market. As such, consumers increasingly rely on consumer protection laws to provide security against the threat of foreclosure and unfair credit practices. The Federal Truth in Lending Act (TILA) was enacted to assure meaningful disclosure of credit and finance terms in consumer credit transactions. Among the various remedies available under TILA, consumers have the right to rescind the entire credit transaction if the lender fails to make certain disclosures. Section 1635(f) provides that a consumer must exercise his or her right to rescind within three years of the loan’s consummation, or the right expires. Thus, the question becomes: how does a consumer exercise his or her right to rescind under TILA? According to the Ninth and Tenth Circuit Courts of Appeal, a consumer must file an action for rescission to exercise his or her right to rescind under Section 1635(f). On the other hand, the Fourth Circuit, relying largely on the Federal Reserve Board’s regulations to TILA, held that a consumer exercises his or her right to rescind merely by sending notice to the lender within the statutory three-year period. This Note explores the split of authority on consumers’ right to rescind under TILA and ultimately proposes that the Fourth Circuit’s holding be reversed by the Supreme Court of the United States.

COMMENTS

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